

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

Bay State Gas Company

D.T.E. 05-27

THE ATTORNEY GENERAL’S MOTION TO COMPEL RESPONSES TO DISCOVERY

Pursuant to 220 C.M.R § 1.06(6)(c)(4) and G. L. c. 30A §§ 11 & 12, the Attorney General of Massachusetts moves to compel the Bay State Gas Company (“Bay State” or “Company”) to respond to several outstanding discovery requests. Bay State has failed to answer numerous information requests issued by the Attorney General more than ten calender days ago, and hearings commence on July 5, 2005. During the discovery conferences prior to this motion, the Company refused to agree to a deadline for when it would submit answers to all over-due discovery. Without full and complete answers to discovery in time to prepare for hearings and draft prefiled testimony, the Attorney General has been prejudiced in his preparation of this case. As a result, the Department of Telecommunications and Energy (“Department”) should compel the Company to respond to discovery and make a corresponding adjustment to the procedural schedule to account for this delay. Despite the original estimate of \$1.6 million for rate case expense, Exh. BSG/JES-1, Schedule 6, the Company is unable to answer the discovery in a timely manner.

I. INTRODUCTION.

A. Procedural History.

On April 27, 2005, pursuant to G. L. c. 164, § 94, Bay State filed with the Department a petition seeking approval of tariffs, a performance based regulation plan and other related mechanisms. The petition seeks a general rate increase of \$22.2 million per year, an increase of 4.7% over 2004 revenues. In addition to this general rate increase, the Company is proposing annual increases for inflation, pipe replacements and changes to pension and pension related benefit costs. Public hearing were held on this matter throughout the Company's service territory on May 25, 2005, May 26, 2005 and May 31, 2005. A procedural conference was held on June 2, 2005. During the procedural conference the Hearing Officer directed the Company to provide all overdue responses to the Attorney General Information Requests ("IRs") sets 1-7 by 5:00 PM Monday, June 6, 2005. The Hearing Officer also directed the Company to provide a list indicating which documents exist or do not exist as they relate to the Attorney General's IRs. On June 5, 2005, the Company filed its response, but did not specifically identify which documents response to the Attorney General's exist. On June 8, 2005, the Attorney General designated a expert witness related to corrosion issues in the Company's distribution system, as well as a witnesses for depreciation, cost of capital, revenue requirements and related topics..

On June 10, 2005, the Hearing Officer issued a memorandum setting forth a very aggressive procedural schedule with discovery on the Company closing on June 20, 2005.¹ Hearings are set to commence on July 5, 2005, with intervenor testimony due on July 8, 2005.

¹ On June 15, 2005, the Attorney General appealed the procedural schedule order, but the Department has not acted on the appeal.

On June 13, 2005, the Hearing Officer issued ground rules requiring responses to information requests within ten calendar days of receipt of the request. Ground Rules, § I (B).

The Attorney General has issued twenty-seven sets of discovery to date. There are few, if any, instances of the Company responding fully to a set of IRs within ten calendar days.

II. ARGUMENT.

A. Bay State Must Respond To Discovery Or Face Sanctions.

With respect to discovery, the Department's regulations provide:

The purpose for discovery is to facilitate the hearing process by permitting the parties and the Department to gain access to all relevant information in an efficient and timely manner. Discovery is intended to reduce hearing time, narrow the scope of the issues, protect the rights of the parties, and ensure that a complete and accurate record is compiled.

220 C.M.R. § 1.06(6)(c)(1); *Verizon*, D.T.E. 01-31 (Phase I), Hearing Officer Ruling on Motion to Compel or in the Alternative, to Strike Portions of Verizon's Testimony, p. 1 (2002). Hearing Officers have discretion in establishing discovery procedures and are guided in this regard by the principles and procedures underlying the Massachusetts Rules of Civil Procedure, Rule 26, et seq. 220 C.M.R. § 1.06(6)(c)(2). Mass. R. Civ. P. 26(b)(1) provides that:

Parties may obtain discovery regarding any matter, not privileged, relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The Department's power to compel is derived from G. L. c. 30A, § 12(1) which provides agencies with the power to require the testimony of witnesses and the production of evidence. Chapter 30A, states, in part, that any party to an adjudicatory proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding. G. L. c.

30A, §12(3). The Department's rule, 220 C.M.R. § 1.10(9), embodies the statutory authority to compel the appearance of witnesses and production of documents by subpoena.

When a party fails to respond to discovery, the Department has the authority to compel a response, impose appropriate sanctions under Mass. R. Civ. P. 37 and take other remedial steps.

220 C.M.R. § 1.06(6)(c)(4). The following sanctions are available to the Department:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose, designated claims or defenses or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

Mass. R. Civ. P. 37(b)(2).

The Company has not responded to IRs and the answers are now overdue under the Ground Rules. During the discovery conference, the Company refused to state when it would respond to all outstanding requests.² This answer is an unacceptable response with hearings set to commence in just a few days, and the Company actively opposing the Attorney General's motions to bifurcate and for other procedural relief. The Company has both the burden of proof and burden of production in this case. Without answers, the Attorney General will not be

² Pursuant to Ground Rule, § I (E), the Attorney General certifies that he initiated discovery conferences which occurred via telephone on June 23 and 24, 2005, at various times throughout the day and totaling approximately forty minutes, with follow-up via telephone on June 27, 2005, in the afternoon, for about fifteen minutes, and on July 30, 2005, in the afternoon for about ten minutes. The phone calls involved Alexander J. Cochis for the Attorney General and Robert Dewees for the Company.

allowed a full and meaningful opportunity to develop topics for cross examination, or will be forced to use limited hearing time to ask questions that were already submitted, but not yet answered, during discovery. Furthermore, the Company answering discovery at the same time cross examination takes place will permit Bay State a “second bite at the apple” if it is dissatisfied with the testimony of a Company witness. The Ground Rules imposed a ten calendar day turnaround time for discovery, and Company did not challenge this requirement.³ The intervenors should be able to reasonably rely on this requirement in time to prepare for hearings.

1) Discovery Request AG 2-1

On May 5, 2005, the Attorney General asked the following question:

For each of the years from 1990 to 2005, please provide the following:

- a) the rate of corrosion leaks per mile for bare steel for the Company;*
- b) the rate of corrosion leaks per mile for bare steel for the each of the Company's separate service areas;*
- c) the rate of corrosion leaks per mile for coated steel without cathodic protection for the Company;*
- d) the rate of corrosion leaks per mile for coated steel without cathodic protection each of the Company's separate service areas; and,*
- e) plot the corrosion leaks on system maps for each of the Company's separate service areas.*
- f) provide all work papers, calculations and assumptions for (a)-(d).*

³ During the June 2, 2005, procedural conference, the Hearing Officer also indicated that she would use the ten calendar day standard.

Bay State's Response.

On June 6, 2005, the Company answered as follows:

Bay State's Department of Transportation (DOT) reported data and distribution system maps do not distinguish between corrosion leaks occurring on its (1) unprotected bare steel ("UBS"), (2) unprotected coated steel ("UCS"), (3) cathodically protected bare steel ("CPBS"), or (4) cathodically protected coated steel ("CPCS"). Although the Company has annually reported for years the miles of UBS, UCS and CPCS mains as well as the number of UBS, UCS and CPCS services on the DOT F7100.1-1 Annual Reports for Distribution Systems, the Company does not report miles of UBS, UCS and CPCS mains and number of services in its three in contiguous service territories on separate DOT F7100.1-1 reports. Rather, the data are captured in individual worksheets and reported in the aggregate.

Corrosion in the technical or operational sense does not occur on any other pipe type except steel. Other metals may deteriorate or graphitize, and otherwise weaken and need replacement, but deterioration in unprotected steel results from corrosion. Therefore, based on its operational judgment, the Company assumes for planning purposes that its corrosion leaks are associated with UBS and UCS-collectively referred to as unprotected steel ("US").

Regarding Bay State's response to items a) & b) above, please see column K (Cor Leaks per Mile of BS and Cor Leaks per 1000 BS Services) of Attachment AG-02-01 for the rate of corrosion leaks per mile of bare steel main and per 1000 bare steel services between 1990 and 2004. The corrosion leak rate in column K was derived strictly from figures from the DOT F7100.1-1 Annual Reports for Distribution System and worksheets. The rate was determined by dividing the number of leaks on mains due to corrosion by the total miles of UBS mains and by dividing the number of leaks on services due to corrosion by the total number of UBS services. Data for each division of Bay State and for the Company on a consolidated basis are separately provided.

Regarding Bay State's response to items c) & d) above, please see column L (Cor Leaks per Mile of UCS and Cor Leaks per 1000 UCS Services) of Attachment AG-02-01 for the rate of corrosion leaks per mile of unprotected coated steel main and per 1000 unprotected coated steel services. The corrosion leak rate in column L was derived strictly from figures from the DOT F7100.1-1 Annual Reports for Distribution System and worksheets. The rate was determined by dividing the number of

leaks on mains due to corrosion by the total miles of UCS mains and by dividing the number of leaks on services due to corrosion by the total number of UCS services. Data for each division of Bay State and for the Company on a consolidated basis are separately provided.

As noted above, the Company's Steel Infrastructure Replacement (SIR) program addresses all unprotected steel. Please see column M (Cor Leaks per Mile of US and Cor Leaks per 1000 US Services) of Attachment AG-02-01 for the rate of corrosion leaks per mile of unprotected steel main and per 1000 unprotected steel services between 1990 and 2004. The corrosion leak rate in column M was derived strictly from figures from the DOT F7100.1-1 Annual Reports for Distribution System and worksheets. The rate was determined by dividing the number of leaks on mains due to corrosion by the total miles of US mains and by dividing the number of leaks on services due to corrosion by the total number of US services. Data for each division of Bay State and for the Company on a consolidated basis are separately provided.

As one can see from column M, the leak rate per mile has increased considerably over the last ten years particularly in the Brockton division. It is this rate of increase that is the primary driver behind the Company's SIR program.

For Bay State's response to e), please note that over the years, the Company has maintained division-specific leak progression maps (i.e., chronological series of maps segmented into sections of each respective service territory), which show where both main and service corrosion leaks were repaired over time. The leak repair data used for plotting these maps comes from the Company's Work Order Management System ("WOMS").

As has been indicated previously to the Attorney General, these maps are available to read in hard copy format at the individual operations centers in Lawrence, Brockton and Springfield. This is because Bay State maintains only one original set of its approximately 236 separate leak progression maps pertaining to its Brockton Division; only one original set of its 30 separate leak progression maps that pertain to its Lawrence Division; and only one original set of its 106 separate leak progression maps that pertain to its Springfield Division. Each individual map denotes activity in various ways. For example, in the Lawrence division, leak progression maps include activity for three distinct time periods worth of leak repairs, while the Springfield division maps denote activity from 1985 to present. Each map is 24 inches by 36 inches in dimension, is colorcoded to differentiate between service and main leak repairs, and may

contain sensitive system and customer specific information. Accordingly, such maps are proprietary to the Company, integral to the operational integrity and safety of its business, can be duplicated only at significant expense, and the removal of such maps from operational centers and the transportation of such vital information to third parties is not recommended under corporate security rules.

The Company will work diligently with the Attorney General to ensure the AG's ability to review these maps in a timely and coordinated fashion at the Company's various operational centers.

After several discovery conferences, the Company submitted a supplemental answer on June 27, 2005, which expanded on the Company's initial response. A copy of this supplemental response is attached as Exhibit B, along with the schedules from the June 6, 2005, response.

Attorney General's Legal and Factual Argument.

The Attorney General requested that the Company provide "provide all work papers, calculations and assumptions for (a)-(d)." The Company did not provide the work papers, calculations and assumptions for its determination of the corrosion leak rates in the original response, or in its supplemental answer. During discovery conferences, the Company claims that it may "revise" some of its corrosion leak rates in order to try to explain why its coated unprotected steel has such a high leak rate, but its bare steel has a much lower leak rate. These figures reveal that the Company has a problem with the coatings on the unprotected pipes. The Company must produce the calculations that resulted in its original answers to this information request in order to assess the accuracy of these numbers and judge whether the Company's "recalculations" are correct or merely a last minute attempt to deflect attention away from problems with its coated unprotected mains.

2) Discovery Request AG 2-10

On May 5, 2005, the Attorney General asked the following question:

Produce copies of all reports, memorandums and analysis related to mains and services corrosion monitoring in the Company's service territories prepared by outside experts or consultants.

Bay State's Response.

On June 6, 2005, the Company answered as follows:

Bay State regularly monitors through corrosion surveys conducted by third-party independent contractors approximately 5,300 services and 2,037 miles of main on an annual basis. Bay State addresses multiple test locations on each of the approximately 4,000 segments represented.

Attachment AG-2-11(a) is a sample 2-sided service test card and a 2-sided mains test card that are used to conduct corrosion testing by in-field personnel. These tests are maintained at our field locations. The primary material generated by these test cards may be reviewed at Bay State's field locations. As it is bulk, numbering over 30,000 cards generated on an annual basis, the Company will work diligently with the Attorney General to ensure the AG's ability to review this information in a timely and coordinated fashion at the Company's various operational centers. Please also refer Bay State's response to AG-2-16.

In turn, the answer to AG 2-11 reads as follows:

See Bay State's response to AG-2-10.

In a June 27, 2005, supplemental response issued after a discovery conference where the Company promised to produce the corrosion testing cards referenced in the response to AG 2-10, the Company revised its response to read:

Please see Bay State's supplemental response to AG 2-1.

Attorney General's Legal and Factual Argument

The Company has refused to produce even a sample of the corrosion testing cards for review, after having stated it would provide the cards in the original June 6, 2005, response and then repeatedly promising it would provide the cards as a sample during discovery conferences. Since the Company has a corrosion problem on its distribution system, these testing cards would provide relevant and probative information. The Attorney General has retained an expert to examine the Company's distribution system, and the timely production of these sample cards could provide information for case preparation. The Attorney General submitted his request almost two months ago, and is entitled to a response. The Company has not objected to the product of the testing cards, and promises to provide copies during discovery conferences, but then inexplicably does not.

3) Discovery Request AG 14-19

On June 6, 2005, the Attorney General asked the following question:

Refer to the Company's response to AG-2-16(a), p. 3 of 34 and the following statements in the report by R.J. Rudden Associates:

Based on interviews conducted with BSG personnel, as well as the accounting, engineering and reporting materials reviewed by Rudden, it appears that BSG has followed a prudent schedule of mains and services replacement, and has operated, monitored and maintained the existing system in a manner consistent with acceptable utility practices. Notwithstanding the application of good practices, the number of leaks has been increasing rapidly in recent years.

- 1) Identify all BSG personnel interviewed and produce copies of all notes from these interviews;*
- 2) Produce copies of all accounting, engineering and reporting material reviewed;*

3) State all facts, with reference to any supporting industry authorities, that support the conclusion that BSG followed a prudent schedule of mains and services replacement;

4) State all facts, with reference to any supporting industry authorities, that BSG operated, monitored and maintained the existing system in a manner consistent with acceptable utility practices;

5) State all facts, with reference to any supporting industry authorities, that BSG applied good practices;

6) Produce all documents from Health Consultants and summarize any oral opinions offered in connection with BSG.

Bay State's Response.

None.

Attorney General's Legal and Factual Argument

The Company has retained an outside expert regarding leaks on the Bay State distribution system and the proposed steel replacement program. The expert produced two reports, and the Attorney General has asked discovery designed to test the asserted facts, opinions and conclusions in the reports. The Company has simply refused to answer the request and further refuses to state when it will answer.⁴ Attorney General is entitled to review this information in order to prepare cross-examination of Company witnesses and prepare prefiled testimony of his own witness. The Company should not be permitted to cut-off discovery on a topic simply by not answering questions until the eve of hearings.

⁴ The Company has declined to answer, without explanation, several other questions regarding the R.J. Rudden reports. See AG 14-15, AG 14-16, AG 14-18 and AG 14-20.

III. CONCLUSION.

As explained fully above, the motion to compel discovery responses should be granted. Under the controlling standards of review, the Attorney General is entitled to responses to the discovery issued. The Company cannot, and must not be permitted, to withhold relevant information from discovery regarding the corrosion problems on its distribution system.

Wherefore: The Attorney General requests an Order that the Company respond fully and completely to AG 2-1, AG 2-10 and AG 14-19 within two (2) business days of the Order. The Department should also extend the deadline for the Attorney General to file the testimony of its witness, Jon Cavallo, by fourteen days to account for the Company's delay in responding to corrosion related discovery. Given the Company's continued dilatory tactics on such an important issue, the Department should exclude from record of this case proof that the Company's mains and services installation, monitoring, repair and replacement efforts have been prudent.

Respectfully Submitted,

THOMAS F. REILLY

By: _____

Alexander J. Cochis
Assistant Attorney General
Utilities Division
One Ashburton Place,
Boston, MA 02108 - 1598
(p) (617) 727-2200 ext. 2406
(f) (617) 727- 1047

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